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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, *et al.*,
Petitioners,

v.

NATHALIE NORRIS, *et al.*,
Respondents.

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE COALITION OF LABOR UNION WOMEN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 99 national and international unions with a total membership of approximately 14,000,000 working men and women, and the Coalition of Labor Union Women (CLUW), an organization of approximately 12,000 individuals concerned with discrimination against women, particularly in the area of employment discrimination, file this brief *amici curiae* in support of respondents with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. This case concerns, on the merits, the application of *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, to a governmental deferred compensation program. The central question, reduced to its essence, is whether the principle, established in *Manhart*, that gender-differentiation in employee retirement programs violates Title VII applies not only to self-insured programs but to insured employer programs as well.

Since Title VII "primarily govern[s] relations between employees and their employer, not between employees and third parties," *Manhart*, 435 U.S. at 718, n.33, it is necessary at the outset to establish the scope for Title VII purposes of the employee-employer relationship. Because the National Labor Relations Act ("NLRA") covers the same relationship and because the two statutes are textually similar in relevant respects, cases decided under the NLRA are instructive here. Analysis of *Ford Motor Co. v. NLRB*, 441 U.S. 488, the NLRA case in this Court most closely in point, makes clear that deferred compensation plans are part of the employee-employer relationship and that none of the various considerations advanced here absolve the employer of responsibility for the gender-differentiated benefits paid by the plan the employer established. This is particularly true in light of the requirements, and the conceptual underpinnings, of 26 U.S.C. § 457, the tax statute that provides the major economic incentive for the deferred compensation plan at issue.

II. Unlike petitioners, many of the *amici curiae* appearing on their behalf do not confine themselves to the narrow issues properly before the Court. Instead, those *amici curiae* seek to relitigate *Manhart*, suggesting that the Court in that case proceeded without a proper understanding of insurance concepts.

1. The central contention in this regard is that gender-differentiated benefits in fact treat employees "equally"

because, given the average difference in life expectancy between men and women, a promise to pay gender differentiated benefits is "actuarily equal," or has equal "present value." But the present value of a stream of future benefits is equal or unequal depending on the classifications used in calculating that value. And *Manhart* unequivocally holds that gender is *not* a classification that may be used under Title VII in the insurance context or otherwise. 435 U.S., at 710. The reason for this ruling, as *Manhart* made clear, is that using such classifications amounts to treating all women as the average woman, with the result that women who deviate from the norm—most women—may well be harmed. Those who disagree with this conclusion are, in the end, simply in fundamental disagreement with Title VII's all but ironclad proscription against sex discrimination in employment, and with the limited nature of the exceptions in the statute to that proscription.

Nor does *Manhart* create any fundamental anomaly between the disparate-treatment and disparate-impact prongs of Title VII analysis. For, as *Manhart* held quite clearly, and as the post-*Manhart* case of *Connecticut v. Teal*, —— U.S. ——, 50 L.W. 4716 (June 21, 1982), confirms, men do not have a *prima facie* case of employmen discrimination under Title VII simply because women as a group receive higher payments *in the aggregate* from a fringe benefit program. Moreover, as *Manhart* also noted, the Bennett Amendment to Title VII, 42 U.S.C. § 2000e-2(h), would in any event provide a defense to such a "reverse discrimination" claim, because actual longevity is a "factor other than sex."

2. The *amici curiae* supporting petitioners also contend that the Court should imply an exception to Title VII to permit gender-differentiation in retirement programs; otherwise, it is said, the results could be disastrous for pension and annuity plans. Again, these same cries of doom were presented to the *Manhart* Court and rejected.

First, as the *Manhart* Court recognized, group insurance plans typically do operate without differentiating the risks attributable to various individual employees. As a matter of fairness, equal security is often seen as more important in the employment context than equal market value.

The possibiilty that Title VII's sex discrimination prohibition could cause destructive adverse selection was also faced by the *Manhart* Court. In that case, participation by employees was mandatory; the Court assessed the likelihood of "opting out" by changing employment to be slight. Similarly, in those voluntary plans where the employer provides a contribution separate from ordinary wages, "adverse selection" on purely actuarial grounds is unlikely in light of the loss to the opting-out employee of the employer contribution involved. While neither of these circumstances here obtains, both the tax advantages and the superior ratio of contributions to benefits that characterize employee group plans will discourage men from opting out *solely because of their sex.* At the very least, the employer has not presented evidence establishing otherwise.

More fundamentally, the entire adverse selection prediction itself rests on a blinkered, gender-based view of the way in which individual employees make economic distinctions. Evidence of this is that the *amici curiae* supporting petitioner *concede* that presently there is substantial adverse selection in annuity programs based on individual health and economic circumstances, yet do not explain why the programs can adjust for such self-selection but not for gender-based selection. That individuals, even after the elimination of gender-based distinctions, may continue to act primarily on the basis of their *own* economic, health, and familial circumstances and not on the basis of a statistical correlation between gender and longevity is entirely ignored.

ARGUMENT

I.

Put succinctly, the central merits question presented in this case[1] is whether an employer may consistent with Title VII knowingly and explicitly contract with an insurance company for a gender-differentiated annuity program that would, under *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, violate Title VII if operated entirely by the employer itself.[2] In effect, the State of Arizona argues that under Title VII employees are left unprotected if their employer choses to contract

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[1] Except for one brief observation (n.19, pp. 20-21, *infra*), we do not address the remedy question.

[2] The employer also suggests that the mere availability of a nondiscriminatory lump-sum option in a deferred compensation program sanctions the gender-differentiated benefit alternatively offered. This argument, apparently, would apply whenever a lump sum "actuarially equivalent" to an annuity is offered, whether the employer contracts out to an insurance company or self-insures.

This suggestion cannot be squared with basic Title VII principles. As the employer stresses, a lump-sum retirement benefit is not the equivalent of a group annuity program, for two reasons: The tax treatment is less favorable, and the periodic benefit available if the lump sum is used to purchase an individual annuity is less because of the loss of the administrative savings involved in group programs. See Pet. Br., at 14-15. To give women a choice between a less favorable gender-neutral option and a more favorable gender-differentiated option is surely " 'treatment of a person in a manner which but for the person's sex would be different,' " *Manhart*, 435 U.S., at 711, and is therefore violative of § 703(a)(1) of Title VII.

Indeed, to sanction a program structured in this way would be in effect to permit employers to coerce waiver of the rights accorded by Title VII. For example, under the suggested reasoning employers could on this same principle give employees a choice between a promotion at a gender-differentiated salary and retaining a less prestigious, lower paid position in which men and women are paid the same amount.

out the provision of its employees' "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), even if the employer in so doing expressly contracts for, and indeed invites,[3] discrimination on the basis of sex. (Cf. *General Building Contractors, Association, Inc. v. Pennsylvania*, —— U.S. —, 50 L.W—. 4975 (June 29, 1982) (employer not responsible under 42 U.S.C. § 1981 for union discrimination in hiring, where employer neither knew nor should have known of the union's discrimination.)[4]

This concept, if upheld, would have widereaching consequences for the achievement of the goal of Title VII—equal employment opportunity. For example, employers might be encouraged to give up self-insured fringe benefit programs and pension plans, now widespread especially in large industrial concerns, for insured plans. As one instance, the cost savings involved in not having to pay for pregnancy disability benefits required as a result of the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e(k), could be substantial.[5] More gener-

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[3] Arizona's contract procurement documents asked potential contractors to *separately* identify the monthly payments available under an annuity program for men and for women. Exh. H to First Set of Interrogatories to Defendants with Answers, R. 12a.

[4] Somewhat similar problems to those in this case arise where a union enters into a collective bargaining agreement with an employer that contains a facially discriminatory provision. However, Title VII, while holding unions responsible for their direct actions, recognizes that employers are in primary control of "compensation, terms, conditions, or privileges of employment." Title VII therefore makes unions liable for Title VII violations concerning these aspects of the employment relationship only where the union "cause[s] or attemp[s] to cause an employer to discriminate" and not where the union acquiesces in employer discrimination as to these matters. 42 U.S.C. § 2000e-2(c).

[5] It is of note that the framers of the PDA clearly understood that Title VII generally, and the PDA particularly, applied to fringe benefit programs whether the employer is self-insured or insured through an insurance company. Section 3 of the PDA,

ally, the notion would seem to insulate employers who contract with consultants to select and administer tests to job applicants, or with a management consulting firm to devise an incentive program.

Title VII cannot be so easily evaded. The statute, of course, "govern[s] relations between employees and their employer, not between employees and third parties." *Manhart*, 435 U.S., at 718, n.33. In that respect, it is like the National Labor Relations Act:

> Despite the deliberate open-endedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place:
>
> > "Section 8(a) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining. . . . But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and the employees." *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971).
>
> [*First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676]

Indeed, the governing language of Title VII is similar to, but broader than, the parallel language of the NLRA: While the NLRA requires bargaining with respect to "wages, hours, and other terms and conditions of employment," 29 U.S.C. § 158(d), Title VII through § 703(a)(1), applies to "compensation, terms, conditions or privileges" of employment. "Compensation" is a more comprehensive term than "wages," see *Manhart*, 435 U.S., at 712, n.22, and the addition in § 703(a)(1) of "privileges" of employment points strongly toward the

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Pub. L. 95-555, 82 Stat. 2077 (1978), specifically states that the statute applies to a "person who, on the date of enactment of this Act, is providing [benefits] either by direct payment *or by making contributions to a fringe benefit fund or insurance program.*" (Emphasis supplied.)

conclusion that deferred compensation programs such as the one at issue in this case, for which individuals become eligible by virtue of being employees, are covered by Title VII's norms.[6]

Consequently, interpretations of the similar but narrower language of the NLRA are instructive in determining where, for Title VII purposes, the "relations between employees and their employer" end and "relations . . . between employees and third parties" begin. And the NLRA cases make clear that the circumstance that an employer has contracted with another person to implement an aspect of covered employment-related matters does *not* absolve the employer from responsibility under the Act, and that, in particular, employers who choose to carry out their fringe benefit programs by contracting with insurance companies do not thereby insulate themselves from the NLRA's coverage.

The most directly in point of this Court's NLRA cases is *Ford Motor Co. v. NLRB*, 441 U.S. 488. In *Ford* the employer provided in-plant food services to its employees by contracting with an independent caterer, which "furnishe[d] the food, management, machines, and personnel . . ." *Id.* at 492. Ford had "the right to review and approve the quality, quantity and price of the food served." *Id.*

The *Ford* Court held that the price of in-plant food services is a mandatory subject of bargaining, recognizing that the matter is "of deep concern to workers." *Id.* at 498. Most important for present purposes is that the Court rejected the suggestion that, because of the employer's choice to use an independent contractor to deliver that service, the service was no longer " 'an aspect of the relationship between the employer and employees.' " *Id.*, at 501, *quoting Chemical & Alkali Work-*

[6] The two acts are also similar in their definition of "employer;" both apply to employers and their agents. Compare 29 U.S.C. § 152(2) with 42 U.S.C. § 2000e(b).

ers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 176.[7] The Court held that, despite the use of an outside contractor, "the matter of in-plant food prices and services is an aspect of the relationship between Ford and its own employees. No third-party interest is directly implicated." 441 U.S., at 501. And, although Ford sought to avoid this conclusion by arguing that "prices [were] set by [the] third-party supplier," the Court refused to be dissuaded by that consideration, in part because Ford had the power under the contract to "review and control food services and prices," but also because the employer could change suppliers or subsidize the price. *Id.*, at 503.[8]

The circumstances here are conceptually identical: There is no question that as a *substantive* matter retirement plans and other frings benefit programs *are* covered by Title VII, as *Manhart* itself illustrates. Perhaps more than in-plant food prices, such programs are matters of "deep concern" to employees. Moreover, here, the employer made a choice to provide an annuity program, just as the employer in *Ford* chose to provide in-plant food services. See 441 U.S., at 498 n.10 (it is immaterial to Court's holding that the employer may not have been obligated to bargain on *whether* to provide in-plant food

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[7] Under the NLRA, even "matters involving individuals outside the employment relationship . . . are not wholly excluded" from the employer's obligations under the Act. *Pittsburgh Plate Glass, supra*, 404 U.S., at 178. Whether this is true under Title VII need not be addressed, since the benefit program here *is*, as established in the text, an aspect of the employment relationship itself.

[8] Justice Blackmun disagreed with the Court on this point, and would have recognized food prices as a condition of employment only "so long as the employer . . . has some measure of actual influence over the prices charged." *Id.*, at 565. It is doubtful whether this disagreement is here material: Since in this case the employer contracted on all the economic aspects of the annuity program, including the gender-differentiation, the employer cannot claim that the matter of benefit amounts was somehow out of its hands.

services in the first place). And, in both instances, the employer chose to use an outside party to implement the basic choice the employer had made. Further, like Ford, Arizona had an active role in establishing the economic aspects of the program by setting its bid specifications and by negotiating contracts with the suppliers. Here in fact, the benefit levels are expressly included in the contracts between the employer and the suppliers.[9] And while the employer here, like the employer in *Ford*, pleads inability to fulfill its legal obligations because of this delegation,[10] the state, like the employer in *Ford*, could if necessary make any of a myriad of changes in its contracts. The clearest demonstration of the parallel is that the *Ford* Court itself noted the similarity between the case before it and cases involving "other kinds of benefits, such as health insurance, implicating outside suppliers," noting that in each such case, "the employer contracts with a third party to provide a benefit to employees." *Id.*, at 503 n.15.

Indeed, the contention in this case that the annuity program is not an aspect of the relationship between the employer and its employees would fly in the face of the tax laws that govern the program and permit the tax advantages the program offers. Under 26 U.S.C. § 457,[11] only plans "established and maintained" by a state em-

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[9] Confirming this analysis is a line of NLRB cases concerning whether the choice of benefit plan administrators is a "condition" of employment. *See Keystone Steel & Wire v. NLRB*, 606 F.2d 171 (C.A. 7). This choice has been determined to be 'an aspect of the relationship between [the employer] and its employees without a third-party interest being directly implicated." *Id.*, at 177.

[10] While we do not here discuss the matter at length, the employer's contention that the stipulated facts establish its inability to find a company willing to provide gender-neutral benefits is, as respondents point out, an entirely unjustified reading of the stipulation.

[11] Section 457 was passed in 1978. Its purpose, however, was to enact into law the thrust of earlier Internal Revenue Service rulings governing certain deferred compensation plans. S. Rep. No. 95-1263; 95th Cong., 2d Sess. (1978), at 52.

ployers are covered, and only "individuals who perform services for the State" may participate. Also, the amount of compensation deferred remains the property of the state (§ 457(b)(6)). Conceptually then the state is paying a portion of its employees' compensation at a later time rather than at the time the employee performs his or her labor, and is *not* simply investing for the employees money already belonging to them. Otherwise, under ordinary taxation principles, the income would accrue to the employee on the date earned, and be taxable then. See S. Rep. No. 95-1263, *supra*, at 51. Thus, to maintain that this program is not an aspect of the employment relationship is to contend that an employer may pay part of an employee's regular wages on a gender-neutral basis and, by delaying payment, part on a gender-differentiated basis, a conclusion squarely in conflict with *Manhart*.

What might be the case if an employer relinquished all control over a given program—for example, if the employer simply permitted any insurance company to approach its employees to sell annuities, or any food vendor to park outside its building—is not the problem here, any more than it was in *Ford*, or in *Manhart*. And, as the *Ford* analogy shows, an employer may no more under Title VII, than under the NLRA, deny employees a statutory protection pertaining to a central condition or privilege of employment by contracting with an outside supplier.

II.

Many of the *amici curiae* appearing on petitioners' behalf range in their arguments far beyond the limited scope of the questions presented to the Court for review. Speaking the technical language of economics, insurance and actuarial science, these *amici curiae* attempt to convince the Court that *Manhart* could not have meant that Title VII demands equal periodic benefits to male and female retirees or, if that is the decision's meaning, that

the *Manhart* opinion reflects a naive, unconsidered and entirely impractical rule on the meaning of equality under Title VII as applied to employee fringe benefits.

If the arguments trooped out on behalf of these propositions have a familiar ring to them, it is little wonder. For, contrary to the implications contained in the *amici curiae* briefs filed on petitioners' behalf and in the supporting commentary critical of *Manhart*,[12] *Manhart* was not decided by a Court ignorant of the arguments traditionally made on behalf of gender-based differences in pension plans and other employee fringe benefit schemes. To the contrary, both the theoretical and the practical justifications put forward in this case are but slightly embellished versions of those presented, largely by the same groups, in *Manhart*.[13] The arguments presented by the employer there, like those presented here, were for a sweeping alteration of the established Title VII principles concerning sex discrimination. The several *amici curiae* appearing on the employer's behalf in *Manhart* argued that those principles are inherently inapplicable to cases involving insurance. This contention takes two related forms: *first*, the assertion that despite diverse treatment based squarely and overtly on gender lines, women and men are in fact being treated "equally"; and *second*, the argument that even if inequality exists, ordinary Title VII principles cannot be applied to invalidate that inequality because there is no rational alternative to using gender classifications in the insurance context.

The Court in *Manhart* chose, quite properly, to present its conclusions with regard to the application of Title VII

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[12] See especially Kimball, *Reverse Sex Discrimination: Manhart* 1979 Am. Bar Fdn. Research J. 82; Bentson, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489.

[13] See, e.g., the briefs filed in *Manhart* by the American Academy of Actuaries, the Teachers Insurance and Annuity Association and the American Council of Life Insurance.

to gender-differentiated retirement plans in legal rather than economic terms. Nonetheless, the *Manhart* opinion answers, albeit briefly, each of the arguments now once again put forward with regard both to the conceptual justification and to the supposed practical necessity for gender-based differences in pension and annuity schemes.

1. "Actuarial Equity."

(a) The first, and the central, contention made on behalf of the proposition that gender-differentiation in periodic retirement benefits does not violate Title VII is that under such a scheme men and women are in fact treated "equally." The notion is that

> In determining whether men and women annuitants have been treated equally, however, the *periodic* payments that will ultimately be received are irrelevant. In deciding whether there has been unfair discrimination, it is necessary to focus on the product purchased by the insured. The proper focus is on the contractual rights received in exchange for the price of the annuity (footnote omitted). The purchaser of a policy does not buy the amounts that will be paid upon occurrence of the event insured against; rather, the product purchases is "the *promise* that if the event occurs, the designated amount will be paid." Benstor, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489, 497 (1982) (emphasis in original); see Kimball *Reverse Sex Discrimination: Manhart*, 1979 Am. Bar Found. Research J. 83, 99-102. The value of the promise received in exchange for the price of the annuity policy "is measured by the present value of the amounts promised multiplied by the probability that the event insured against will occur. . . ." Benston 49 U. Chi. L. Rev. at 503. At retirement, the present value of an annuity purchased by a woman is *identical* to the value of an annuity purchased by a similarly situated man. (footnote omitted). Since the annuity plans offered

> to men and women are of identical value, there is equality of treatment consistent with Title VII. [Brief of the American Council of Life Insurance as *Amicus Curiae* in Support of Petitioners ("Life Ins. Br."), at 13-14; *see also*, e.g., Brief of the American Academy of Actuaries as *Amicus Curiae* ("Actuaries Br."), at 12; Brief *Amicus Curiae* of the National Association of Insurance Commissioners ("Commissioners Br."), at 24; cf. *Peters v. Wayne State University*, 691 F.2d 235 (C.A. 6).]

The unstated premise for this "actuarial equality" or "equal present value" argument is that it is proper to calculate "the probability that the event insured against will occur" separately for men and for women. It is true, but only in *statistical* terms, that because women *on the average* live longer than men *on the average*, it is more "probable" that a woman will live past a certain age than a man.[14] The same proposition is also true in that sense if other classifications—place of residence, smoking history, weight, genetic background for example—are used as the basis for determining the probability of an individual living past a certain age.

It may be true that many of the available alternative classifications are, for reasons of administrative cost, likelihood of fraud, or social policy considerations, less attractive to insurers than sex and age classifications. See *Bentson*, *supra*, 49 U. Chi. L. Rev., at 500-501, 519. But that does not alter the fact that each does have some statistical correlation with longevity, and therefore could be used to express the probability that a given individual

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[14] It is important to note that actual longevity—the number of years an individual does in fact survive—cannot be determined in advance. Thus, gender-based actuarial tables do *not* classify by longevity. Rather, the rule that annuity payments continue only as long as a person survives is the rule that classifies by actual longevity; paying each person equal periodic benefits that end when he or she dies is therefore the accurate way to take into account actual longevity.

will live to a given age; consequently, these classification factors are potentially relevant, on a theoretical level, in determining the present economic value to a certain person of a promise of a contingent benefit. That such factors are not used in practice for this purpose only confirms that the concepts of "present value" and "actuarial equality" are independent of the *particular* classification choice made to determine the probability portion of the equation. Thus, since "[t]he statement that some particular person is expected to live some certain number of years is dependent upon a prior decision about how to classify that person . . . . an 'equal present value' test is futile" in the sense that the "present value" of a stream of potential future benefits will be equal or unequal depending on the particular classification or classifications used in calculating that value. Brilmayer, et al., *Sex Discrimination on Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. Chi. Rev. 505, 512.

This means that the question as far as Title VII is concerned cannot be settled simply by agreeing whether it is periodic benefits or the present value of those benefits that are to be compared. Rather, the Title VII issue is whether, in translating promised benefits into present value, an employer may, consistent with Title VII, treat every woman as if her life expectancy were that of the average woman. *Manhart* speaks to this question directly:

> It is true that insurance is concerned with events that are individually unpredictable, but that is characteristic of many employment decisions. Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII. [435 U.S. at 710.] [15]

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[15] For example, automobile insurance statistics show women on the average to be safer drivers than men. And, it may not be possible, even using other indices of safe driving, to determine which men present special risks. For this reason, insurance companies do, at least at certain ages, charge higher rates to men. Nonetheless, we

Manhart also explains quite clearly *why* classifying insurance risks along gender lines is antithetical to Title VII. The reason is that

> all individuals in the respective classes do not share the characteristic that differentiates the average class representative . . . [T]here is no assurance that any individual woman will actually fit the generalization on which the . . . policy is based. [435 U.S. at 708.]

Reading Title VII as therefore "preclud[ing] treatment of individuals as simply components of a racial, religious, sexual or national class" (*id.*), the *Manhart* Court refused to permit women's take-home pay to be affected because of a statistically accurate correlation that has no necessary application to any specific individual.[16]

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believe that an employer could not under Title VII hire only male drivers. Nor, we would think, could an employer reject male drivers, or pay them less, because of gender-based higher insurance costs.

[16] The *Manhart* principle that even accurate statistical correlations do not justify use of explicit gender lines under Title VII is consistent with the Court's Equal Protection Clause cases. In these cases as well, the Court has

> . . . rejected the use of sex as a decision making factor even though the statutes in question . . . rested on . . . predictive empirical relationships.
>
> In both *Frontiero* [*v. Richardson*, 411 U.S. 677 (1973)] and [*Weinberger v.*] *Wisenfeld* [420 U.S. 636 (1975)] [this Court] expressly found appellees' empirical defense of mandatory dependency tests for men but not for women to be unsatisfactory, even though it recognized that husbands are still far less likely to be dependent on their wives than vice versa. . . . It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that *inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause*. . . . In sum the principles embodied in the Equal Protection Clause are

Reducing women's benefits rather than their take-home pay in no way alters the nature of the injury visited upon them. And, the inequity exists whether one focuses upon periodic benefits or, as the insurance industry *amici curiae* insist we must, upon some "present value" concept.

Under Arizona's plan, if Nathalie Norris were to retire at age 65, she would, under the discriminatory plan in which she is enrolled, receive $33.95 less each month than a 65-year old fellow male employee whose contribution was the same. Moreover, were each to die twenty years later, her total lifetime benefits would be $8,148.00 less than his. Jt. App., at 12. The supposed reason for this result—that women "on the average" live longer—amounts simply to the fact that *more* women than men are likely to live twenty years beyond retirement. This preponderance does not, however change the precise similarity of the circumstances of *each* woman

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not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the . . . tendencies of aggregate groups. [*Craig v. Boren*, 429 U.S. 190, 203 & n.13, 204, 208 (emphasis added).]

Nor is the insurance context distinguishable because it is not possible to determine with any certainty *which* women (and men) will ultimately live longer than the average person. While it would have been possible, although administratively inconvenient, to determine dependency in *Frontiero* and in *Wiesenfeld*, in other cases it was difficult or impossible to discover in advance precisely which individuals had the trait that allegedly justified the gender-based discrimination. In *Craig*, for example, "there [was] no apparent way to single out persons likely to drink and drive." 429 U.S. at 227 (Rehnquist, J., dissenting). Nonetheless, "injury to all of the young men of the state [cannot] be justified by visiting the sins of the 2% on the 98%." *Id.*, at 214 (Stevens, J., concurring). The same was true in *Stanton v. Stanton*, 421 U.S. 7: While it "may be true that girls mature earlier than boys," 421 U.S. at 14, there is probably no practical way for the state to determine which girls are more mature or which boys less mature, or to legislate on the basis of maturity rather than gender. Nonetheless, the Court in *Stanton* invalidated the gender-based line.

and of *each* man who survives for the same number of years.[17] Conversely, those women who do not survive to the age at which the "average" woman dies are, again, no differently situated as *individuals* than the larger number of men who die early. Indeed, to these women, Arizona's plan is doubly injurious: Not only are they denied the benefit of retirement income, both periodic and aggregate, equivalent to that of an exactly similarly situated man, but they must absorb a greater portion of the cost of subsidizing women who do live longer than if that cost were distributed among all employees.

If one uses a pure "present value" approach, the results are no different. For, whether or not it is efficient for plan administrators to take into account the various factors that may influence an individual's valuation of an annuity plan (or any other insurance program), individuals surely do take those factors into account, albeit not in the precise quantitative manner economists might prefer. Thus, for a woman who has smoked a pack of cigarettes a day for thirty years, or is one hundred pounds overweight, or has a terminal illness, or expects to inherit $1 million at age 75 but to be penniless before

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[17] This much-discussed "84% overlap" explanation, see Bergmann & Gray, *Equality in Retirement Benefits: The Need for Pension Reform*, 8 Civ. Rts. Dig. 25 (1975); *Norris v. Arizona Governing Committee*, 671 F.2d 330, 332 n.1, is simply a graphic way of illustrating this real-life meaning of the statistical generalities: Since, 84% of men and of women can be matched with a person of the same sex who dies at the same age, the differences in average age at death of men and women is the result of differences at the extremes, and not of differences affecting most men or most women. Put another way, this is not a situation in which the average age at death differs because 90% of men die between the ages of 65 and 70, while 90% of women die between 70 and 75. If anything, the 84% overlap explanation *understates* the point central to the legal analysis. For, in fact, for *any* woman there may be *at least one* man similarly situated with regard to actual longevity. Whether there is more than one such man, or whether there are more such women than men, does not deflect from this critical circumstance.

that, "the subjective worth" (Bentson, *supra*, 49 U.Chi L.Rev., at 503) of a promise to pay periodic benefits at a certain level after retirement may well be less than that of the "average" woman, and equivalent to that of many men. Only if employees are forced to disregard their own physical, social and economic circumstances and to view themselves only as female employees or as male employees may it be said that a promise to pay gender-differentiated benefits has equal "actuarial" value for all women and for all men.[18]

Thus, it is simply not true that the gender-based classification Arizona has used is "neutral" in the "separate but equal" sense that no economic injury, present or future, will result from that classification. Commissioners Br., at 23. Rather, the perception that a woman such as Nathalie Norris has not been disadvantaged at all is the result of a blinkered vision of employees simply as men or as women. *Manhart* unequivocally declared that the gender-based treatment dictated by such a vision is inconsistent with Title VII, for it "does not pass the simple test of whether the evidence shows 'treatment of a person which but for a person's sex would be different.'" 435 U.S., at 711.

(b) In the end the real quarrel the insurance industry *amici curiae* have is not with *Manhart*, but with Title

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[18] This latter point can be seen more sharply if one supposes an employee benefit plan that provides only disability benefits for women, and only pension benefits for men, with each benefit plan having the same "present value" in the sense that accurate probability calculations and financial assumptions were used. The scheme might be justified on the ground that more women than men have dependent's annuity coverage available to them through their husband's employment, while no dependent's disability coverage is available. That some women, given the choice, would have chosen a pension, while some men would have chosen the disability benefits can scarcely be doubted. Nor can it be said that an unmarried woman, or a man with a chronic illness, would be making an economically irrational judgment arriving at such a choice.

VII. In particular, those *amici curiae* insist that "[a]lthough Title VII sets forth a rule of per se illegality for explicit racial distinctions, no such rule pertains in the area of sex discrimination." Life Ins. Br., at 17; see also, e.g., Bentson, *supra*, 49 U.Chi.L.Rev., at 493; Commissioners Br., at 23. Title VII *does* differentiate between race and sex classifications in that two special statutory defenses to sex discrimination are stated: § 703(e), the "*bona fide* occupational qualification" ("bfoq") defense, and the last sentence of § 703(h), the "Bennett Amendment," which permits sex discrimination otherwise violative of Title VII if "authorized" by the Equal Pay Act, 29 U.S.C. § 206(d). But the affirmative prohibitions in Title VII, contained in § 703(a), treat race and sex in a precisely parallel manner, and the two express defenses must therefore be taken as the only differences between race and sex discrimination for Title VII purposes.

The "bfoq" exception is inapplicable on its face, since it is limited solely to decisions whether to "hire and employ;" discrimination as to those other matters—"compensation, terms, conditions, and privileges of employment"—covered by § 703(a)(1) cannot be justified by a "bfoq". And *Manhart*, of course, held that the Bennett Amendment does not save gender-based benefit programs, because "an actuarial distinction based entirely on sex is [not] 'based on any other factor other than sex.' Sex is exactly what it is based on." 435 U.S. at 712-713.[19]

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[19] In discussing the Benett Amendment, the Court found it unnecessary to decide "whether retirement benefits or contributions to benefit plans are 'wages' under the [Equal Pay] Act, because the Bennett Amendment extends the Act's four exceptions to all forms of "compensation" covered by Title VII." 435 U.S. at 712, n.23.

The question whether fringe benefit contributions or payments are "wages" for Equal Pay Act purposes may, however, ultimately,

Consequently, whatever the proponents of "[a] [r]evisionist [v]iew of [s]ex [d]iscrimination in [e]mployment" might prefer, Life Ins. Br., at 17, relying on Freed and Polsby, *Privacy, Efficiency and the Equality of Men and Women; A Revisionist View of Sex Discrimination in Employment*, 1981 Am. Bar Found. Research J. 585, 589, the view Congress incorporated in Title VII does not sanction an exception to the Title's equal treatment principle because some employers may find it "efficient" to use "a demonstrable statistical relationship" to calculate benefit payments. *Id.*[20] So *Manhart* unequivocally holds.

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have to be decided in a case involving the appropriate *remedy* for gender-based differentiation in pension plans. The Equal Pay Act expressly prohibits "reduc[ing] the wage rate of any employee" in order to comply with the statute's requirements, 29 U.S.C. § 206(d)(1); it has therefore been suggested that equalization of pension benefits would have to be at the rate promised for men, for some or all future benefit payments. We note in connection with that suggestion, that under the FLSA provisions of which the Equal Pay Act is a part, fringe benefits are not "wages"; if the FLSA were not so limited, employers could pay less than the prescribed minimum wage as long as fringe benefits were provided as well. Thus, benefits are "wages" under the Equal Pay Act, only if Congress used a single term differently in two parts of the same statutory section. And, if those payments are not "wages", the Equal Pay Act "topping up" provision would not apply, and more flexibility in fashioning a remedy might be possible.

We do not understand the "topping up" remedy question to be within the second Question Presented in this case, the only one pertaining to the remedy. Indeed, the District Court issued no order specifying whether the benefits of retirees must be at the former level set for men; the order required that benefits in the future be "equal" for men and women who have retired. *Norris v. Arizona Governing Committee*, 486 F. Supp., at 652. While we therefore do not in this brief pursue the matter further, we do suggest caution in evaluating any estimates of the cost of compliance with *Manhart* which assume the necessary applicability of the Equal Pay Act.

[20] Arguably, in one case this Court approved, in the absence of an express statutory exception, a distinction explicitly based on a classification covered by Title VII. In *Steelworkers v. Weber*, 443

The *Manhart* rule does not, as some of the *amici curiae* supporting peitioners and of the critical commentators suggest, e.g., Brief *Amicus Curiae* of the Equal Employment Advisory Council, at 23; Life Ins. Br., at 19; Bentson, *supra*, 49 U.Chi. L. Rev., at 505-506, 511-512; cf. Rutherglen, *Sexual Equality in Fringe-Benefit Plans*, 65 Va.L.Rev. 199, result in sanctioning unlawful discrimination against men (or, with regard to certain other benefit schemes or options, women). The notion is that the disparate impact prong of Title VII analysis, see *Griggs v. Duke Power Co.*, 401 U.S. 424; *Connecticut v. Teal*, —— U.S. ——, 50 L.W. 4716 (June 21, 1982), incorporates a rule that absent "actuarial equality" or equal aggregate benefit payments for men and for women (or, as the more consistent commentators concede, for blacks and white, or Christians and Jews), there is an unlawful discriminatory effect.[21] *Manhart* creates no such anomaly.

Manhart, as just noted, rejected the "suggestion that a gender-neutral pension plan would itself violate Title VII because of its disproportionately heavy impact on male employees" reasoning that "each retiree's total pension benefits is ultimately determined by his *actual life span*." 435 U.S., at 710-711 n.20 (emphasis in original). As the Court added, while "[e]ven a completely neutral practice will inevitably have some disproportionate im-

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U.S. 193, however, "the legislative history of Title VII and the historical context from which the Act arose" convinced the Court that "an interpretation of [Title VII] that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute.'" *Id.*, at 201-202. Here, the only legislative history arguably supporting the view that Title VII does not outlaw sex discrimination in benefits plans was one "isolated comment on the Senate floor" which the Court in *Manhart* viewed as entirely inadequate to "change the effect of the plain language of the statute itself." 435 U.S. at 114.

[21] Bentson maintains that "race and sex should be treated similarly with respect to insurance benefits." 49 U.Chi.L.Rev., at 512.

pact on one group or another [,] *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Id.* It could hardly be otherwise.

As the *Manhart* opinion intimates, acceptance of the proposition that Title VII requires equal aggregate benefits under each benefit program for each sex (or race, or religion, or nationality) would have a disruptive effect of massive proportions upon established benefit plans. For not only do "[v]irtually all defined benefit plans" provide gender-neutral basic monthly retirement benefits, Actuaries Br., at 5,[22] but many other types of fringe benefit plans could well turn out upon examination to provide higher aggregate benefits over some period of time to one gender, race, nationality or religion than another; whether or not this is the case, however, could only be determined retroactively.[23] Moreover, even those plans that *do* differentiate on a gender basis do not necessarily do so in a manner that precisely reflects the aggregate benefits to be paid (in the future) to the male and female employees of the particular employer involved. For example, of the plans contracted for by Arizona, one calculates female annuities based on a four-year set-back of the male table, while another uses a five

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[22] Defined benefit plans account for most of those negotiated by AFL-CIO industrial unions, and in all likelihood cover more than half the pension fund participants in the country.

[23] For example, in the Pregnancy Discrimination Act ("PDA"), Congress reversed *General Electric Co. v. Gilbert*, 429 U.S. 125, and *required* employers to provide equal disability benefits for pregnancy-related disability. The costs of doing so are significant and add to the already higher aggregate disability benefits paid to women workers. H.R. Rep. No. 948, 95th Cong., 2d Sess. 2 (1978); *Gilbert, supra*, 429 U.S. 125, 130-31 nn.9-10. Congress, however, enacted the PDA in the belief that doing so restores sexual equality in disability benefits rather than mandating a *prima facie* case of illegal discrimination. *See generally*, H.R. Rep. No. 948, *supra*; S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977).

year set-back. Exh. 3. Both cannot at once accurately reflect the true average difference between Arizona's male and female population; one or the other table will necessarily produce in the end unequal aggregate benefit payments to men and to women. Nor could it have been determined with any certainty at the time the plan was established which (if any) prediction is accurate.

Thus, neither the "aggregate benefit" approach nor its corollary, the actuarial equality theory, is to be preferred to the *Manhart* approach on the ground that adopting that theory will limit or simplify litigation on the question of the equality of employee fringe benefits. Rather, the opposite is probably true.

The *Manhart* Court did not go on to explain in detail *why*, on a *Griggs* analysis, a difference in aggregate benefits for men and for women does not establish a *prima facie* case of illegal disparate impact.[24] But the reason was made clear when the Court last term, in *Connecticut v. Teal*, further explicated the meaning of "disparate impact" under Title VII. *Teal* holds that the role of disparate impact analysis is *not* to assure equality of *outcome* with regard to employees of different sexes, races, or religion. Rather:

> In considering claims of disparate impact under § 703(a)(2) this Court has consistently focused on employment and promotion requirements that create

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[24] *Manhart* did reject the sugestion that *General Electric Co. v. Gilbert, supra*, had established that a showing of unequal aggregate dollar benefits over some time period for men and women could establish a *prima facie* case of illegal disparate impact under § 703(a)(2). The Court noted that *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 expressly disavowed such a reading of *Gilbert*. *Manhart*, 435 U.S., at 716 n.29. Indeed, to read *Gilbert* in this way would be to believe that the male employees of General Electric could have brought a Title VII case, because "women drew substantially greater sums than did men from General Electric's disability-insurance program, even though it excluded pregnancy." *Satty*, 434 U.S., at 144.

> a discriminatory bar to *opportunities*. This Court has never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted. [50 L.W. at 4719 (emphasis in original).]

For:

> Section 703(a)(2) prohibits practices that would deprive or tend to deprive "*any individual* of employment opportunities." The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. [*Id.* at 4720 (emphasis in original).]

And, in a gender-neutral benefit program, while a "bottom line" difference in effect could be shown by aggregating all benefits by gender, no *individual* man is adversely affected as compared to any *individual* woman. But receive the aggregate amount of benefits to which he or she is entitled based on his or her *own actual life span* at the same monthly rate applicable to every other employee.

The second response in *Manhart* to the supposed disparate impact anomaly is that where longevity determines the aggregate benefit payments, "any differential in benefits paid to men and women in the aggregate is . . . 'based on [a] factor other than sex' and consequently immune from challenge under the Equal Pay Act, 29 U.S.C. § 206(d)" (and, by virtue of the Bennett Amendment) under Title VII as well. 435 U.S., at 710 n.20; see *also id.* at 713 n.24. Again, while *Manhart* did not pursue this point at length, the Court has had a second occasion to explore the implications of the Bennett Amendment for cases in which a sex-correlated difference in compensation is claimed to violate Title VII's disparate impact prohibition. In *County of Washington v. Gunther*, 452 U.S. 161, 170-171, the Court stated:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, pro-

scribing "not only overt discrimination but also practices that are fair in form, but discriminatory in opperation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the appliciation of the Act to wage differentials attributable to sex discrimination. H.R. Rep. No. 309, 88th Cong., 1st Sess., 3 (1963). Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex."

Under the Equal Pay Act, the courts and administrative agencies are not permitted "to substitute their judgment for the judgment of the employer . . . who [has] established and employed a bona fide job rating system," so long as it does not discriminate on the basis of sex. 109 Cong.Rec. 9209 (statement of Rep. Goodell, principal exponent of the Act).

While the Court in *Gunther* did not finally determine "how sex-based wage discrimination cases under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act," *id.* at 171, the Court *did* confirm its indication in *Manhart* that the Bennett Amendment would permit defenses to some Title VII disparate impact compensation cases, on the ground that the factor underlying the gender differential is a "factor other than sex." [25]

2. Practical necessity

Aside from the attempt to show that *Manhart* represents a wrong-headed approach to Title VII, the *amici*

[25] Of course, a "factor other than sex" must be one entirely unconnected to any gender-based discrimination. *Corning Glass Works v. Brennan*, 417 U.S. 188.

curiae supporting petitioners make a plea for an implied exception to that Title based on the *necessity* of proceeding along gender-based lines in determining pension benefits. Again, the *Manhart* Court was presented with these same cries of the impossibility of complying with Title VII principles in cases such as that, and the instant case and the Court properly rejected those entreaties.

In the first place, *Manhart* recognized and stressed a critical fact conveniently ignored by the *amici curiae* who seek to apply present-day insurance industry concepts to this situation: This is a *group insurance* program, not one sold on the open market to any interested customer.

It is true that the program in this case is far removed from the *Manhart* program in the degree to which it partakes of the potential advantages and typical characteristics of group employee benefit programs. For example, employees need not take part in the program; because there are no employer contributions, there is no necessary economic loss if an employee decides not to participate. And because employees may express some preferences as to investment and distribution of their funds, the administrative cost savings typical of group plans appear to be less. Nonetheless, the contracts are all "group" annuity contracts, e.g., Ex. 3, Ex. 4, Ex. 6; that such contracts incorporate substantial administrative and marketing savings, and therefore result in higher periodic benefits than contracts available on the open market, is a point stressed on the employer's behalf. See, e.g., Commissioners Br., at 5. Also, as we have seen (Part I, *supra*), the tax treatment of this program is similar to that accorded group benefit programs generally.

In employee *group* insurance, unlike that individually purchased on the open market, "[t]reating different classes of risks as though they were the same is a common practice that has never been considered inherently unfair." *Manhart*, 435 U.S., at 710. Thus, *all* employees are typically eligible for employment-related disability

benefits, or health insurance, or life insurance, whether or not insurance would be available to them on the market. And, as we have discussed (p. 23, *supra*), many pension plans and almost all other benefit programs make no distinctions at all among employees in the benefits provided when the insured risk occurs. Sometimes the cross-subsidies involved, if one wishes to view them that way, are huge. Many union negotiated plans, for example, provide family health coverage; obviously, in that circumstance single employees are "subsidizing" those with families in the sense that a family head would be obliged in a market transaction to pay a private health insurance company several times as much as a single individual. But the focus in employee benefits is often on equivalent security for all employees, not on equivalent market value or equivalent cost.[26]

The second strain of the necessity argument is that pension programs will be distorted or destroyed because men will not participate in the annuity plan at all or will choose lump sum options when available, or will bring pressure on employers (at least in heavily male groups) to eliminate pension plans and pay higher wages so that each employee may purchase sex differentiated pensions on the market.

Again, the *Manhart* court addressed these "self-selection" arguments and recognized that at least where participation in a pension plan is mandatory, "adverse

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[26] Even as to individual insurance, the objection that some available predictors of risk, such as smoking habits or weight, are "inefficient" to use hardly speaks to any issue of *fundamental fairness*. It could well be said to be less "fair" for nonsmokers to subsidize smokers in group life insurance than for men to "subsize" women in annuities, since smokers have volition as to their risk-increasing actions. Yet, if economic efficiency factors can justify as a matter of "fairness" failure to use available predictors even where the higher-risk person is responsible, it is all but impossible to see why concepts of gender equality incorporated in federal statutes should not do so as well.

selection" is not a real threat. 435 U.S., at 716 n.30.[27] Even where participation is voluntary, where an employer contribution is provided, opting-out is too costly to the employee to be attractive. And, the tax benefits and cost savings of group plans also make it unlikely that an employee who would otherwise choose a group annuity contract will not do so because of the availability of gender-differentiated annuities on the market. At the very least, these considerations demonstrate that the realistic possibility of significant adverse selection in a group plan setting varies widely from plan to plan, and that group plans that are gender neutral both as to employee contributions and as to benefits can be (and have been) devised which greatly minimize this problem. Consequently, a broad-swathed exception to Title VII cannot be justified on grounds of economic impossibility. This is particularly true because, as we have seen, the rule that "actuarial equality" is mandated by Title VII would produce results at least as disruptive to establish fringe benefit plans as those the *amici curiae* envisage being created by *Manhart*.

Two final comments are in order on the economic issues:

First, the *amici curiae* and the commentators upon whom they rely attempt to justify the use of only age and sex data with respect to annuities on the ground that persons in poor health will not choose annuities anyway. Life Ins. Br., at 12; Bentson, *supra* 49 U.Chi.L.

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[27] On finding that gender-based distinctions were not reasonably necessary to the employer's pension plan in *Manhart*, the Court had no reason to address the legal consequences of such a showing. We note in this regard that, at the very least, a necessity defense of this ilk would require *proof* of the necessity and not mere speculation. Here, there is no record at all on the question. There is consequently no more basis than there was in *Manhart* for broaching the major issue of whether there are any circumstances that could justify implying an exception to the carefully-thought-out scheme of Title VII.

Rev., at 518. What that means, however, is that where annuity participation is voluntary, adverse selection is already occurring. Why the annuity system has been able to tolerate only this type of adverse selection is not explained.

Second, and related, is the central consideration that all of the adverse selection prophesies suppose that individual employees will make choices about their annuities based only, or primarily, upon statistical correlations betwee life expectancy and gender. That individuals may instead act primarily on the basis of what they know about *themselves*—their health, their economic circumstances, their family situations—is not considered. Thus, even the economic analysis proffered on petitioners' behalf reflect a habit of thinking about individuals inconsistent with the gender neutral normative rule Congress stated in Title VII.

CONCLUSION

For the above stated reasons, the decision below should be affirmed.

Respectfully submitted,

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